Supreme Court, U.S.
FILED

96 959 DEC 16 1996

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No. _____

In The

Supreme Court of the United States

October Term, 1996

THE STATE OF TEXAS,

Petitioner,

v.

KENNETH RAY CLARK,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

TIM CURRY
Criminal District Attorney
Tarrant County, Texas

CHARLES M. MALLIN,
Assistant Criminal District Attorney and Chief of the Appellate Division

DAVID M. CURL,
Assistant Criminal District Attorney

DANIELLE A. LEGAULT,
Assistant Criminal District Attorney

Attorneys for Petitioner

*ANNE E. SWENSON,
Assistant Criminal District Attorney

401 W. Belknap Street
Fort Worth, Texas
76196-0201
(817) 884-1687
(FAX) (817) 884-1672
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the failure to uphold the excusal for cause of a veniremember, who has suggested she would consciously distort her answers so the death penalty would not be imposed, is consistent with the competing interests underlying the *Sixth Amendment* right to an *impartial* jury.

2. Whether the Texas Court of Criminal Appeals' failure to consider the *entire* voir dire examination eviscerates the deferential standard of review demanded by *Wainwright v. Witt*, 469 U.S. 412 (1985).

3. Whether the Texas Court of Criminal Appeals' concept of "the critical inquiry" can be reconciled with *Witt*'s basic principles.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The State of Texas, Petitioner herein,[1] by and through Tim Curry, the Criminal District Attorney of Tarrant County, Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas in this capital murder case.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas vacating Clark's death sentence and remanding the cause for a new hearing on punishment is reported at 929 S.W.2d 5 (Tex. Crim. App. 1996), and is reprinted in the appendix hereto, App. 1.

JURISDICTION

The opinion and judgment vacating Clark's sentence of death was entered on May 22, 1996. The Court of Criminal Appeals of Texas subsequently denied the timely filed State's Motion for Rehearing without written opinion on September 18, 1996. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257.

[1] For clarity, the Petitioner is referred to as "State," and the Respondent is referred to as "Clark."

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment in *Duncan v. Louisiana*, 391 U.S. 145 (1968), provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an *impartial* jury of the State and district wherein the crime shall have been committed. . . .

U.S. CONST. amend. VI (emphasis added).

STATEMENT OF THE CASE

I. Course of proceedings and disposition below

Clark was indicted on July 16, 1991, in the Criminal District Court Number Three of Tarrant County, Texas, for the capital offense of murdering Robert Campbell in the course of committing and attempting to commit the offense of robbery, which occurred on or about May 10, 1991.[2] (Tr. 3)[3] *See* TEX. PENAL CODE § 19.03(a)(2) (Vernon 1989).

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[2] On or about May 10, 1991, Appellant sought to rob Cordy's Tires in Tarrant County, Texas. Mr. Campbell, an honor student at a local university, was a tire store customer at the time of the offense.

[3] "Tr." refers to the transcript of documents filed with the court in Clark's 1992 trial, followed by citation to the applicable page number(s). Similarly, "SOF" refers to the statement of facts from Clark's 1992 trial, followed by citation to the applicable volume(s) and page number(s).

A jury found Appellant guilty of capital murder on February 15, 1992. (Tr. 148; SOF XXVII-553-55) On February 19, 1992, following a separate punishment hearing, the jury affirmatively answered the special issues submitted pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1989). (Tr. 157-59) The trial court subsequently assessed Appellant's punishment at death. (SOF XXIX-277-81) Appeal to the Texas Court of Criminal Appeals was automatic.

On May 22, 1996, the Court of Criminal Appeals reversed the trial court's judgment and remanded the cause to the trial court for a new hearing on punishment,[4] finding that veniremember Elaine Jones was improperly excused from jury service because "the trial court could not rationally have concluded that the State discharged its burden to show Jones was unable to abide by the statutory scheme notwithstanding her preference to 'let God' make that kind of ultimate decision." *Clark*, 929 S.W.2d at 9. The opinion cites the *Witt* standard as controlling. *See Clark*, 929 S.W.2d at 6.

On September 18, 1996, the Court denied the State's Motion for Rehearing without written opinion. This petition for writ of certiorari timely follows.

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[4] *See Clark*, 929 S.W.2d at 10; *see also Ransom v. State*, 920 S.W.2d 288, 297-98 (Tex. Crim. App. 1994) (opinion on reh'g) (holding that error in granting State's challenge for cause against a venireman for inability to follow some facet of the law applicable only to punishment constitutes "error affecting punishment only"); *see generally Witherspoon v. Illinois*, 391 U.S. 510, 523 n. 21 (1968) ("Nor . . . does today's holding render invalid the conviction as opposed to the sentence, in this or any other case.").

II. Statement of facts

Before individual questioning began, the trial court spoke to the *entire* venire panel. The trial court explained how the special issues operate in Texas' bifurcated capital punishment scheme:

THE COURT: In Texas, we have what is known as a bifurcated trial. Those of you who are not accustomed to that word, I think I already explained to you what it is.

The punishment for capital murder is life imprisonment or death by lethal injection.

There are other charges involved in this case, called lesser included offenses. As we come to you in your voir dire, we will be more explicit and explain them to you as they come up.

In a capital case, if the Defendant is found guilty, the jury does not decide whether they will assess the death penalty by lethal injection or assess a life imprisonment. Instead, they are asked to answer three questions in the punishment phase. The answer to these questions dictate what punishment will be issued.

So it's accurate to say the jury does not assess capital punishment. It's also accurate to say the way you answer the questions dictate what punishment the Court will assess. So your duty as potential jurors, should the defendant be found guilty of capital murder, would be to

> answer those questions, after hearing further evidence; and then the Court, of course, has the duty to assess the proper sentence.

SOF III-47-48.

Thereafter, on January 9, 1992, Elaine Jones was the fifth veniremember to be called for individual questioning. The trial court reminded Ms. Jones that this was a capital murder case. (SOF V-4) He also told her that it would take several weeks to select a jury, and the actual trial was expected to last seven to ten days. (SOF V-3-4) The trial court further advised the veniremember that the jury might have to be sequestered. (SOF V-4)

Ms. Jones indicated that sequestration might present some unique or unusual problems because of her pregnancy. (SOF V-4-5) When Ms. Jones revealed her due date was March 8, 1992, the trial court inquired: "So we might just have to stop and all go the hospital and watch?" (SOF V-5)

Ms. Jones began her interview with the State by affirming that she was against the death penalty:

> [State]: I notice from reading your questionnaire that you are against the death penalty; is that right?
>
> [Ms. Jones]: Yes.

SOF V-6. In addition, the veniremember acknowledged that it was important for her to be at her work at the Superconducting Supercollider laboratory since the project was just getting underway. (SOF V-6) Ms. Jones indicated that she soon would be taking some leave to have her baby. (SOF V-7) Ms. Jones also confirmed that she had

served on another jury in the past year. (SOF V-6) Even though Ms. Jones professed to understand that she could take an exemption based on her prior jury service, the trial judge sought to assure himself of her complete understanding through the following questions:

THE COURT: Did you understand Monday when you were here that if you had served in the last twenty-four months you could take an exemption if you wanted to?

[Ms. Jones]: Yes.

THE COURT: You decided you didn't want to?

[Ms. Jones]: Yes.

THE COURT: Okay. Carry on.

SOF V-7-8. The State then resumed its questioning.

In response to the prosecutor's further inquiry, Ms. Jones repeated that she would rather forego an exemption and serve on the jury "[i]f I have to." (SOF V-8) The State again assured Ms. Jones: "You don't have to." (SOF V-8) The prosecutor also reminded the veniremember that the State was seeking the death penalty and "you might be uncomfortable sitting on a jury where you are called upon to serve and deliberate on an issue that you might be morally against." (SOF V-8) The State probed:

[State]: Are you morally against the death penalty?

[Ms. Jones]: Somewhat. It depends on the case.

[State]: Okay. What are your views on the death penalty?

[Ms. Jones]: If I feel someone has committed a crime and evidence proves that they have, I am for it.

[State]: So you are not against the death penalty? Let me get this straight here just in my mind.

[Ms. Jones]: Okay.

[State]: Question 41 asks you, "Which of the following best describes the way you personally feel about the death penalty?" And you checked, "Generally against the death penalty"?

[Ms. Jones]: Yes.

[State]: Okay. Maybe I need a little additional explanation on that.

[Ms. Jones]: Generally against, in that I just feel that, you know, I would have to listen and find out, do I really believe that the person committed the crime and whether or not, you know, what type of crime it was, did they really do it? If so, there are cases that I would feel that, yes, they should receive the death penalty. And there are cases that I think they shouldn't.

SOF V-8-9. Next, the State asked Ms. Jones to clarify her response and give an example of a case where a defendant received the death penalty but it seemed unjustified, or a case where an accused did not receive the death penalty but it seemed warranted. Ms. Jones was unable to offer a single example of either situation. (SOF V-9) The State told Ms. Jones that the law provides a jury can consider the death penalty if they find the defendant guilty of committing a murder during the course of a

robbery. (SOF V-9-10) Ms. Jones indicated that she thought the law was fair. (SOF V-10) Ms. Jones further indicated that she could consider giving someone the death penalty in such a situation. (SOF V-10) When asked what kind of case she would be against the death penalty, the veniremember replied she really did not know: "I haven't thought about anything like this." (SOF V-10)

Ms. Jones revealed that her general opposition to the death penalty was more religious than moral. (SOF V-10) The State then asked:

[State]: *How does your religion in you trigger a general opposition to the death penalty?*

[Ms. Jones]: *More so, let God take care of it.*

[State]: If you were selected to serve on a jury in which the State was arguing for the death penalty, *would you feel an obligation to let God take care of it* rather than you yourself being able to vote such that the death penalty would be assessed to the death penalty [sic]?

[Ms. Jones]: *Let God take care of it.*

SOF V-10-11 (emphasis added). At this point, Texas' bifurcated scheme was again explained to Ms. Jones. (SOF V-11) The prosecutor then posed the following hypothetical:

[State]: *Supposing you were serving on a jury and you had found a defendant guilty of capital murder, you found that they committed capital murder, and one of the options is they receive the death penalty, would you find yourself wanting to vote in such a way so*

that the death penalty was not assessed so that God could take care of it?

[Ms. Jones]: *Yes.*

[State]: And that is something that you – that is a religious belief that you hold; is that right?

[Ms. Jones]: Yes.

[State]: That is a religious belief that you have held for a long period of time?

[Ms. Jones]: Yes.

[State]: Is that a religious belief that you feel is deep-seated within you?

[Ms. Jones]: Yes.

SOF V-11-12 (emphasis added). A little later, the prosecutor stopped his questioning to further explain to Ms. Jones as follows:

[State]: The law certainly does not require that you serve on this jury. All the law requires is that you are able to follow an instruction from the Court. . . . And if you have an opposition to the death penalty such that you don't feel like you could serve on the jury, then you shouldn't be required to.

[Ms. Jones]: Okay.

[State]: Is that how you feel?

[Ms. Jones]: Yes.

[State]: Do you feel like that's left to someone else and that you would be a better juror in some other kind of case, which you have been recently?

[Ms. Jones]: Yes.

[State]: I take it that your religious feeling about the death penalty is such that following instructions from the Court to give the death penalty consideration would violate your conscience or religious views, something like that; is that right?

[Ms. Jones]: Yes.

SOF V-12-13. The State then passed Ms. Jones to the defense.

In response to defense counsel's leading questions, Ms. Jones affirmed that she felt it was her civic duty to serve as a juror, irrespective of personal distaste. (SOF V-14) Ms. Jones also stated that she could imagine voting for the death penalty if the facts were horrible and the law permitted it. (SOF V-14-15)

Next, defense counsel sought to plumb Ms. Jones' comprehension of Texas' capital punishment scheme, explaining:

[Defense counsel]: Do you understand that in a capital murder case in Texas that a jury does not determine that a person will receive the death penalty as such. By that, I mean that a jury first has to determine whether or not the Defendant has committed the offense that he is charged with – that is, the capital murder – and in a bifurcated trial – that is, the two-stage trial – you first make that determination before you get into the punishment stage. And after having found a person guilty, then the jury is called upon to

answer at least two questions. Those questions appear up there on the board.

If you would, take just a moment to read Question Number 1, please.

[Ms. Jones]: (Prospective juror complies.)

[Defense counsel]: Now, if a person has been found to be guilty of the offense itself, then the jury answers Question Number 1 and Question Number 2. If both of those questions are answered "yes," then the Judge is the one that has to set the punishment at the death penalty.

Do you understand that?

[Ms. Jones]: Yes.

[Defense counsel]: In other words, you would not actually say by your verdict that, "I find that this Defendant should be killed by lethal injection."

Do you understand that?

[Ms. Jones]: Yes.

[Defense counsel]: If you were chosen to serve as a juror in a capital murder case such as this one, would you be able to listen and give fair consideration to all the evidence that was presented by both the State and the Defendant?

[Ms. Jones]: Yes.

[Defense counsel]: And based on that, would you be able to follow the Court's instructions at the conclusion of the case

and *determine what in your mind would be a rightful decision?*

[Ms. Jones]: *Yes.*

SOF V-15-16 (emphasis added). In response to defense counsel's question, Ms. Jones agreed that if a defendant were found guilty she would be able to answer the special issues "without violating [her] conscience." (SOF V-16) Ms. Jones further affirmed there were some cases where death was an appropriate punishment, however, she did not feel that way about a lot of cases. (SOF V-16-17) The veniremember also agreed that although it might be painful to serve in a capital case, she could do it and follow the trial court's instructions, even if it resulted in the imposition of the death penalty. (SOF V-17)

At the conclusion of defense counsel's voir dire, the trial court questioned Ms. Jones further:

THE COURT: Do you understand – while we are waiting there, do you understand actually the scheme that we are dealing with here?

[Ms. Jones]: Yes.

THE COURT: Did you serve on a criminal case?

[Ms. Jones]: Yes.

THE COURT: Did you get to the punishment phase?

[Ms. Jones]: No.

THE COURT: Okay. See, we actually have – a trial is divided into, in fact, two trials. If the Defendant is found guilty of capital murder that means that the jury finds beyond a reasonable doubt that the defendant has committed a murder while in the course

of committing another crime and he is found guilty of capital murder, then we start over.

[Ms. Jones]: Okay.

THE COURT: You may or may not receive additional evidence, but you will have another Jury Charge and another argument of counsel. Then you don't say life or death, but you do answer these questions, at least those two. Sometimes there is a third one.

And it's accurate to say that the jury doesn't assess the death penalty, because obviously the Judge reads it. But you do understand the way you answer those questions tells me what punishment I have to assess?

[Ms. Jones]: Yes.

THE COURT: The jury is doing it?

[Ms. Jones]: Yes.

THE COURT: You don't get to – the terrible burden of standing up and saying, "Do it." But, in effect, the way you answer those questions determines what I have to do. There is no in-between person.

[Ms. Jones]: Yes, I understand.

THE COURT: Your decision is ultimate?

[Ms. Jones]: Yes.

THE COURT: All right. Would you wait outside just a minute? We need to do some law talk.

[Ms. Jones]: Okay.

(Prospective juror excused from the courtroom.)

SOF V-17-19. The State challenged Ms. Jones for cause, asserting:

[State]: [S]he has a conscious objection to the infliction of the death penalty that goes to prevent or substantially impair her service as a juror in a capital case.

THE COURT: Will you kind of summarize? I had a little trouble with who was going to make the ultimate decision, her or God.

[State]: That's the thing. She testified that she would vote in such a way that the death penalty would not be inflicted so that God could take care of the situation. And she testified that her religious feeling is deep-seated and long held.

SOF V-19. Thereafter, the trial court granted the State's challenge over defense counsel's objection, likewise observing:

THE COURT: She thought – as I understood her testimony, *she thought that God should make the ultimate decision*. It was a little confusing, but I got the impression that God was going to do it for her.

SOF V-19 (emphasis added).

REASONS FOR GRANTING THE WRIT

The reversal of the trial court's excusal for cause of veniremember Elaine Jones is the latest in a succession of Texas Court of Criminal Appeals' decisions generally misapprehending both the *Sixth Amendment* guarantee of an *impartial* jury and *Witt*'s basic tenets. *See, e.g., Clark,* 929 S.W.2d at 9 (holding veniremember was improperly excused despite fact she had suggested she would consciously distort her answers so the death penalty would not be imposed); *Riley v. State,* 889 S.W.2d 290 (Tex. Crim. App. 1994) (opinion on reh'g) (finding prospective juror's excusal was erroneously predicated upon nothing more than her moral and religious scruples against the death penalty by discounting veniremember statements showing she strongly opposed the death penalty and could not participate in a proceeding in which the death penalty was handed down), *cert. denied,* 115 S.Ct. 2569 (1995); *cf. Brown v. State,* 913 S.W.2d 577, 580-81 (Tex. Crim. App. 1996) (discussing *Riley* with approval). In this line of cases, the Texas Court of Criminal Appeals has demonstrated a repeated readiness to run roughshod over the balance of competing interests that this Court has found critical to the constitution of an *impartial* jury. *"[I]mpartiality* requires not only freedom from any bias against the accused, but also any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes v. Missouri,* 120 U.S. 68, 70 (1887) (emphasis added).

Witt sets forth the standard to be applied and the deference to be accorded a trial court's determination when reviewing the constitutionality of an excusal for cause of a veniremember who opposes the death penalty.

The Texas high court's efforts to interpret and apply the *Witt* standard in *Clark* directly conflicts with opinions of the highest courts of the several states, as well as the opinions of this Court and the various federal courts of appeals. The decision in *Clark* not only revives *Witherspoon*'s high burden of proof, it unjustifiably usurps the authority of trial courts, and fails to acknowledge the state's legitimate interest in excluding veniremembers whose opposition to the death penalty would cause them to consciously distort their answers.

Adherence to sound precedent is a cornerstone of our criminal justice system. "[T]he very concept of the rule of law . . . requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2808 (1992). The Texas Court of Criminal Appeals has shown a persistent willingness to dismantle the basic framework of *Sixth Amendment* jurisprudence explicated in *Witherspoon*, *Adams*,[5] *Witt* and their progeny. Summary reversal would be appropriate.

In *Witherspoon v. Illinois*, 391 U.S. 510, 520, 522-23 n. 21 (1968), this Court identified the two competing interests which form the basis of the *Sixth Amendment* right to an *impartial* jury. First, the Court declared that a state could not "stack the deck" against a defendant by excluding for cause all veniremembers who expressed conscientious or religious scruples against the infliction of the death penalty. *Witherspoon*, 391 U.S. at 521-23. At the same time, the Court recognized that a state has a

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[5] *See Adams v. Texas*, 448 U.S. 38 (1980).

legitimate interest in excluding those veniremembers whose opposition to the death penalty would preclude their impartiality and thereby frustrate the administration of the state's constitutionally valid death penalty scheme. In attempting to strike an appropriate balance between these two competing interests, the Court noted *in dicta* that veniremembers may be excluded for cause consistent with the *Sixth Amendment* if they make it

> unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Witherspoon, 391 U.S. at 522-23 n.21 (emphasis in the original).

In *Adams v. Texas*, 448 U.S. 38, 46-47 (1980), the Court reexamined the *Witherspoon* standard in the context of Texas' capital punishment scheme. In particular, the Court addressed the issue of whether veniremembers could be constitutionally excluded from jury service solely because they were unable to take a statutory oath used for jury qualification.

By striking down this practice as violative of the *Sixth* and *Fourteenth Amendments*, this Court effectively dismissed any notion that one response can be elevated over all the others; rather, a veniremember's views on the death penalty must be viewed in their *entirety*. *See Adams*, 448 U.S. at 49-51. In addition, the discretionary nature of the jury's task led this Court again to conclude that a state could not constitutionally "exclude all jurors who

would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty." *See Adams*, 448 U.S. at 50.

The Court took care to emphasize that it was not unmindful of the state's competing interest, however. The Court held that a state could *insist* a juror answer the statutory questions without conscious distortion or bias. "The State does not violate the *Witherspoon* doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty questions with this degree of *impartiality*." *Adams*, 448 U.S. at 46 (emphasis added).

Thus, *Adams*, like *Witherspoon* before it, represents an accommodation of competing interests, resulting in the following balanced test:

> [A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Adams, 448 U.S. at 45.

Five years later, the Court seized the opportunity to clarify *Witherspoon* and reaffirm the *Adams* standard in *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). *Witt* recited the *Adams* test with approval, affirmatively holding that "the State may exclude from capital sentencing juries that 'class' of veniremen whose views would prevent or substantially impair the performance of their duties in accordance with their instructions or oaths." *Witt*, 469 U.S. at

424 n.5. In addition, the Court expressly recognized that *Adams* had dispensed with *Witherspoon*'s automatic decision making approach,[6] as well as *Witherspoon*'s stringent measure of proof:

> We note that, in addition to dispensing with *Witherspoon*'s reference to "automatic" decision making, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.

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[6] The *Adams* Court concluded that *Witherspoon*'s "automatic decision making" approach cannot be squared with the duties of Texas' capital sentencing juries:

> In such circumstances it does not make sense to require simply that a juror not 'automatically' vote against the death penalty; whether or not a venireman might vote for death under certain personal standards, the State still may properly challenge that venireman if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge.

Witt, 469 U.S. at 422.

Witt, 469 U.S. at 424-25. *Witt* also made clear that the trial court's determination that a potential juror is impermissibly biased is essentially a credibility determination entitled to due deference on direct review. *See Witt*, 469 U.S. at 427-30 (juror bias is question of fact for trial court to determine).

Although it cites *Witt* as controlling, the Texas Court of Criminal Appeals' opinion fails to reflect *Witt*'s balanced approach to the *Sixth Amendment*. The invention of "the critical inquiry" violates *Witt* in at least two fundamental respects.

I. In direct contravention of *Witt*, the Texas Court of Criminal Appeals expressly refuses to consider the *entire* voir dire examination or to accord the trial court any deference

The Texas Court of Criminal Appeals has openly and persistently refused to consider the *entire* voir dire examination or to accord the trial court's juror bias determination any deference. *See Clark*, 929 S.W.2d at 8-9; *Riley*, 889 S.W.2d at 299-301. To the Texas high court, the timing of the response rather than its substance is key. Responses suggesting a veniremember would consciously distort her answers to the punishment issues are not considered *if* they are voiced before "the critical inquiry" has been made. *See Clark*, 929 S.W.2d at 8-9; *Riley*, 889 S.W.2d at 299. After eliminating all such responses from their consideration, the Texas high court reasons no deference is due because deference is only due in a vacillating juror situation. *See Clark*, 929 S.W.2d at 8-9; *Riley*, 889 S.W.2d at 301 (observing that "it would be anomalous, to say the

least, to defer to the trial court, *Wainwright v. Witt* notwithstanding").

Whether such a holding is a good idea is not the point. The point is that the holding is not a faithful interpretation of *Sixth Amendment* law under *Witt*. *Witt* demands that both the trial and the appellate court(s) consider the voir dire in its *entirety*.[7] *See also Adams*, 448 U.S. at 49-51 (single response not considered crucial). Indeed, *Witt* expressly repudiates just the sort of catechistic approach that the Texas Court of Criminal Appeals is requiring. *See Witt*, 469 U.S. at 424-25 ("determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of catechism"). Trial courts and appellate courts alike are instructed not to focus solely on one answer or passage from the voir dire. Instead, they are to examine the testimony of the veniremember as a *whole*. *See Witt*, 469 U.S. at 432, 434; *Ellis v. Lynaugh*, 873 F.2d 830 (5th Cir.) (evaluation of contention that veniremember was improperly excused for cause requires study of *entire* record), *cert. denied*, 493 U.S. 970 (1989).

Furthermore, *Witt* teaches that juror bias is essentially a credibility determination whose basis cannot be easily discerned from the appellate record. *See Witt*, 469

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[7] *See also People v. Williams*, 641 N.E.2d 296, 319 (Ill. 1994) (great deference must be afforded trial court's finding of juror bias and juror's remarks must not be considered in isolation but as a *whole*); *Bryson v. State*, 876 P.2d 240, 252-53 (Okla. Crim. App., 1994) (appellate court must look at *entire* voir dire examination when determining whether trial court's exclusion for cause was proper).

U.S. at 429. As a result, *Witt* demands that the trial court's decision on juror bias be accorded due deference.[8] Such a holding reflects a basic understanding that a juror's answers do not alone decide the issue; oftentimes, it is the trial court's power of observation that provides the most accurate method of ascertaining the truth. *Witt*, 469 U.S. at 428-429.

Faced with a cold record, it is beyond dispute that appellate courts are already at a disadvantage in reviewing what is essentially a trial court credibility determination. *See Witt*, 469 U.S. at 429 (acknowledging that a trial court's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record"). It is completely nonsensical to exacerbate this appellate limitation by holding that an appellate court must consider something less than the sum of what the trial court heard.

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[8] In applying *Witt*, other state high courts consistently have recognized that the trial court's juror bias determination is entitled to due deference. *See Ferguson v. State*, 642 A.2d 772, 777 (Del. 1994) (deferring to trial court's finding of bias although at one point veniremember asserted he would "try to do the right thing" as the law and evidence required); *Castro v. State*, 644 So.2d 987, 989 (Fla. 1994) (deferring to trial court's finding of bias even though veniremember testified at one point he could set aside beliefs against the death penalty and follow law given by trial court); *State v. DiFrisco*, 645 A.2d 734, 747-49 (N.J. 1994) (deferring to trial court's finding of bias although veniremember testified at one point she could listen and evaluate case fairly and agreed capital punishment could be appropriate in some cases).

Witt is the polestar for *all* questions of juror bias; nothing in *Witt's* language limits its application to a vacillating juror situation. While the law on juror bias is as stated in the *Witt* opinion; the question on appeal is: whether the trial court's finding of *substantial impairment* constitutes an abuse of discretion in light of the record as a whole. *See Witt*, 469 U.S. at 433. In making this determination, it is clear that *Witt's* due deference requirement can be neither discounted nor ignored. "To the sophistication and sagacity of the trial judge the law confides the duty of appraisal." *Witt*, 469 U.S. at 434. If appellate courts are permitted to selectively consider one response and elevate it above all others, the appellate court has effectively displaced the trial court, commandeering a function institutionally assigned elsewhere.

In sum, by choosing to ignore certain voir dire testimony showing a *veniremember would consciously distort her answers to the punishment issues*, the Texas Court of Criminal Appeals has held that a biased juror is qualified as a matter of law. *See Clark*, 929 S.W.2d at 8-9. Such a result is at complete odds with the *Sixth Amendment's* concept of an *impartial* jury. In that regard, *Witherspoon*, *Adams*, *Witt* and their progeny expressly recognize that the state has a "legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." *Witt*, 469 U.S. at 420; *see also Adams*, 448 U.S. at 44; *Witherspoon*, 391 U.S. at 522-23 n.21. As this Court has observed: A defendant being tried for a capital crime is not entitled to a standard that allows jurors to be seated who quite likely will be biased in his favor. *See Witt*, 469 U.S. at 423.

II. In further violation of *Witt*, the Texas Court of Criminal Appeals has resurrected *Witherspoon's* high burden of proof which this Court repudiated in *Adams*

The *Clark* opinion instructs the State to ask the veniremember point-blank "whether his opposition to the death penalty is such as to cause him to answer one of the special issues in such a way as to assure a life sentence will be imposed, irrespective of what the evidence may be." *Clark*, 929 S.W.2d at 8. By suggesting the State prove juror bias by directly asking the aforementioned question, the Court is improperly resurrecting *Witherspoon's* stringent standard of proof, *i.e.*, that juror bias be established with "unmistakable clarity." This standard was laid to rest over 15 years ago in *Adams*. *See Witt*, 469 U.S. at 424-25.

Furthermore, *Witt* permits a state to exclude veniremembers with a less than categorical opposition to the death penalty. *See Witt*, 469 U.S. at 422. *Witt* also teaches that there is no single critical inquiry "because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Witt*, 469 U.S. at 424.

The Texas Court of Criminal Appeals' undue focus on whether "the critical inquiry" has been asked, turns the quest for impartial jurors on its head. The focus should be on the strength and substance of the veniremember's beliefs not the adroitness of the questioner. The folly of searching for "the critical inquiry" is that oftentimes, as shown here, the veniremember's responses are accorded short shrift.

Moreover, while the *Witt* Court expressly recognizes that a veniremember "may wish to hide [her] true feelings,"[9] the Texas Court of Criminal Appeals' opinion erroneously refuses to contemplate what would happen if the trial court simply does not believe the veniremember's answer to "the critical inquiry." This is particularly unfortunate given that here, the trial court may well have had reason to doubt Ms. Jones' veracity in view of the fact that she chose to forego an exemption from jury service (SOF V-7), so that she could serve on a jury where she would have to violate her religious beliefs in order to obey her oath as a juror.

While the *Witt* opinion contains the controlling law on juror bias, this Court has observed that "[r]elevant voir dire questions addressed to this issue need not be framed exclusively in the language of the controlling appellate opinion; the opinion is, after all, an opinion and not an intricate devise in a will." *Witt*, 469 U.S. at 433-34; *see also Darden v. Wainwright*, 477 U.S. 168, 176-78 (1986) (*Witt* inquiry does not end with a mechanical recitation of a single question and answer; instead, reviewing court must view voir dire in its *entirety*). Under the guise of "the critical inquiry," the Texas Court of Criminal Appeals improperly seeks to limit *Witt*'s application and subvert the *Sixth Amendment*.

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[9] *Witt*, 469 U.S. at 426-30; *see also Patton v. Yount*, 467 U.S. 1025, 1036 (1984) (where criminal defendant sought to excuse a juror for cause and the trial court refused, the question was simply "did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence *and should the juror's protestations of impartiality have been believed.*") (emphasis added).

III. Summary

The Texas Court of Criminal Appeals' opinion erroneously robs the trial court of the discretion it is due under *Witt*. Under the *Clark* Court's new standard, *Witherspoon*'s high burden of proof must be satisfied *and* the veniremember must later vacillate before the trial court's discretion comes into play. This is not only not the law; it is misguided.

Witherspoon was abandoned, at least in part, because it failed to take into account that some biased veniremembers will never admit they cannot follow the trial court's instructions. *See Morgan v. Illinois*, 112 S.Ct. 2222, 2232-33 (1992) (observing that "follow the law" questions are inadequate to detect persons with views preventing or substantially impairing their duties as jurors, and pointing out that jurors inalterably against the death penalty could in all truth and candor respond affirmatively to general questions of fairness and impartiality personally confident that their dogmatic views are fair and impartial). *Witt* recognized that the trial court must be given latitude to deal with these veniremembers.

CONCLUSION

For the foregoing reasons, the State of Texas respectfully requests that the petition for writ of certiorari be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

TIM CURRY
Criminal District Attorney
Tarrant County, Texas

CHARLES M. MALLIN,
Assistant Criminal District
Attorney and Chief of the
Appellate Division

DAVID M. CURL,
Assistant Criminal District
Attorney

DANIELLE A. LEGAULT,
Assistant Criminal District
Attorney

*ANNE E. SWENSON,
Assistant Criminal District
Attorney

401 W. Belknap Street
Fort Worth, Texas 76196-0201
(817) 884-1687
FAX (817) 884-1672

Attorneys for Petitioner
**Counsel of Record*

Kenneth Ray CLARK, Appellant,

v.

The STATE of Texas, Appellee.

No. 71462.

Court of Criminal Appeals of Texas,
En Banc.

May 22, 1996.

Rehearing Denied Sept. 18, 1996.

J. Rex Barnett, Elizabeth Horan, Fort Worth, for appellant.

Anne E. Swenson, Danielle A. LeGault, Asst. Dist. Attys. Fort Worth, Robert A. Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

CLINTON, Judge.

Appellant was convicted of the offense of capital murder. V.T.C.A. Penal Code, § 19.03. At the punishment phase of trial, the jury answered affirmatively the special issues set forth in former Article 37.071(b), V.A.C.C.P. The trial court then sentenced him to death as required by former Article 37.071(e), V.A.C.C.P. Direct appeal to this Court is automatic. Former Article 37.071(h), V.A.C.C.P. Appellant does not challenge sufficiency of the evidence in any respect. We will vacate the trial court's judgment and remand the cause for a new punishment hearing.

In point of error number fifteen, appellant contends the trial court erred in granting the State's challenge for cause against venireman Elaine Jones based on her religious scruples against the death penalty. Under *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), a venireman may be excluded for cause consistent with the Sixth Amendment to the United States Constitution when his views on capital punishment are such that they would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Vuong v. State*, 830 S.W.2d 929, 942 (Tex.Cr.App.1992); *Moody v. State*, 827 S.W.2d 875, 888 (Tex.Cr.App.1992); *Ellis v. State*, 726 S.W.2d 39, 44 (Tex.Cr.App.1986). Prospective jurors may not be excused merely because their beliefs about the death penalty might influence the decision-making process. *Vuong*, supra.

The voir dire of venireman Jones was unusually brief. The prosecutor never explained to her the procedure by which a capital accused, once found guilty of the offense, is sentenced. The following voir dire must be understood in that light:[1]

> "[THE PROSECUTOR:] Are you morally against the death penalty?

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[1] The offense occurred on May 10, 1991, and trial commenced in February of 1992. The procedure applicable to the punishment phase of appellant's trial was therefore governed by Article 37.071 as it read prior to amendment by Acts 1991, ch. 838, §§ 1 & 5, pp. 2898-2901, eff. Sept. 1, 1991. Presumably any capital punishment proceeding on retrial will be conducted under current Article 37.0711, V.A.C.C.P. See Acts 1993, ch. 781, §§ 2 & 6, pp. 3060-3062, eff. Aug. 30, 1993.

[JONES:] Somewhat. It depends on the case.

Q. Okay. What are your views on the death penalty?

A. If I feel someone has committed a crime and evidence proves that they have, I am for it.

* * *

Q. Question Number 41 [on the questionnaire] asks you, 'Which of the following best describes the way you personally feel about the death penalty?' And you checked, 'Generally against the death penalty'?

A. Yes.

Q. Okay. Maybe I need a little additional explanation on that.

A. Generally against, in that I just feel that, you know, I would have to listen and find out, do I really believe that the person committed the crime and whether or not, you know, what type of crime it was, did they really do it? If so, there are cases that I would feel that, yes, they should receive the death penalty. And there are cases that I think they shouldn't.

* * *

Q. Is your general opposition to the death penalty something that is religious or moral, or what is it in you that triggers a general opposition to the death penalty?

A. More religious.

* * *

Q. How does your religion in you trigger a general opposition to the death penalty?

A. More so, let God take care of it.

Q. If you were selected to serve on a jury in which the State was arguing for the death penalty, would you feel an obligation to let God take care of it rather than you yourself being able to vote such that the death penalty would be assessed to the death penalty [sic]?

A. Let God take care of it.

Q. So if you were on a jury – let's picture this for a second.

You are on a jury, and you found someone guilty of capital murder. And the way our trial works, if someone's found guilty of capital murder, we have a second phase to the trial in which the death penalty is an option that the jury could decide. Supposing you were serving on a jury and you had found a defendant guilty of capital murder, you found that they committed a capital murder, and one of the options is they receive the death penalty, would you find yourself wanting to vote in such a way so that the death penalty was not assessed so that God could take care of it?

A. Yes."

However, on questioning by defense counsel, Jones indicated that "where the facts would be so horrible and where the law permitted it," she could "vote for the death penalty" if she was instructed that that was "what the law was." And after appellant explained the legal procedures involved and that the venireman would not actually be called upon to assess punishment, but only to answer specific questions, the following transpired:

"[DEFENSE COUNSEL:] If you were chosen to serve as a juror in a capital murder case such as this one, would you be able to listen and give fair consideration to all of the evidence that was presented by both the State and the Defendant?

[JONES:] Yes.

Q. And based on that, would you be able to follow the Court's instructions at the conclusion of the case and determine what in your mind would be a rightful decision?

A. Yes.

Q. And if that decision included finding that the Defendant was guilty, would you then be able to answer those questions up there without violating your conscience?

A. Yes.

Q. And even though you admittedly feel that there are some cases where capital punishment or death is a proper decision, there are a lot of cases that would be a capital case, perhaps, that you may not feel that way; is that correct?

A. Yes.

Q. And even though it might be a painful situation for you to serve in a capital murder case, do you think you could do that and would do that and follow the Court's instructions?

A. Yes, I would.

Q. And if those instructions resulted after you answered the questions or after the trial was completely over, if those answers of the questions resulted in the Defendant receiving the death penalty, would you be able to do that?

A. Yes."

After this, the trial court again explained to Jones the procedure at the punishment phase of a capital trial. Then, however, without further inquiry as to whether Jones could follow that procedure and answer the special issues honestly and without conscious distortion or bias, according to the evidence, the trial court granted the State's challenge. In doing so, the trial court opined that "[h]er religious scruples would affect her ability to be a fair and impartial juror[.]"

In *Riley v. State*, 889 S.W.2d 290 (Tex.Cr.App.1994) (Opinion on State's motion for rehearing), this Court reviewed a similar point of error. There venireman Brown had a far more deep-seated conscientious objection to the death penalty than did Jones in this cause. However, Brown also unequivocally maintained that, notwithstanding those objections, she could answer the punishment questions presented in accord with the evidence. The State contends, as it did in *Riley*, that this indicates a vacillating venireman and, therefore, the challenge must be upheld. We disagree with the State's assessment.

In *Riley* we held that, even though answering the punishment questions might violate her conscience, this did not indicate that venireman Brown would be substantially impaired in her duties, but only that her attitude might "affect" her deliberations. *Riley*, supra, at 300. Once the capital punishment procedure was explained to Brown, so long as she consistently affirmed that she could answer the questions in accordance with the evidence, "neither the difficulty she may have in doing so,

nor the fact it might violate her conscience, renders her a 'vacillating' venireman in any material sense." *Id.*

It is the burden of the challenging party to establish the venireman he has challenged for cause will be substantially impaired in his ability to follow the law. *Hernandez v. State,* 757 S.W.2d 744, 753 (Tex.Cr.App.1988) (Plurality opinion). Demonstrating that the venireman has conscientious scruples against the death penalty is not alone sufficient to meet the State's burden to show he will be substantially impaired from honestly answering the special issues of former Article 37.071(b) in accordance with the evidence. In order to meet that burden, the State should directly ask the question of the venireman whether his opposition to the death penalty is such as to cause him to answer one of the special issues in such a way as to assure a life sentence will be imposed, irrespective of what the evidence may be. Once that question is asked, the trial court's task is clear. If the venireman steadfastly maintains he will not consciously distort his answer to the special issues, he has shown no inability to follow the law, and may not be excused on State's challenge for cause. *Brown v. State,* 913 S.W.2d 577, at 580 (Tex.Cr.App.1996); *Riley v. State,* supra; *Hernandez,* supra. A venireman who steadfastly maintains he *will* consciously distort his answers *must* be excused on challenge for cause. *Brown,* supra. Under either contingency, the trial court has no real discretion, for the venireman has unequivocally shown, in the former, that he can follow the law, and in the latter, that he cannot. On the other hand, once the question is asked, the venireman who genuinely equivocates or vacillates in his answer may be

excused for cause or not, depending on demeanor, intonation, or expression. Here the trial court's discretion comes fully into play. *Hernandez*, supra, at 753. However the trial court exercises its discretion under these circumstances, it will be upheld on appeal. *Brown*, supra; *Riley*, supra, at 299; *Perillo v. State*, 758 S.W.2d 567, 577 (Tex.Cr.App.1988).

Under questioning by the State, Jones testified she was "somewhat" against the death penalty on moral grounds, but that her opposition was "more religious." She even acknowledged that she "would . . . find [herself] wanting to vote in such a way so that the death penalty was not assessed so that God could take care of it." But all of this was before the operation of the special issues was explained to her. In fact, the State neither explained the capital punishment procedure to Jones nor made the critical inquiry whether her apparent preference to "let God take care of" deciding who should suffer the death penalty would affect her ability honestly to answer the special issues without conscious bias or distortion in accordance with the evidence. Only appellant's counsel even came close to asking that question. Moreover, when he did, Jones answered unequivocally that she could follow the court's instructions and answer the questions even if that resulted in imposition of the death penalty. Under these circumstances the trial court could not rationally have concluded that the State had discharged its burden to show that Jones was unable to abide by the statutory scheme, notwithstanding her preference to "let God" make that kind of ultimate decision. *Hernandez*,

supra, at 754; *Riley,* supra, at 301.[2] The trial court thus abused its discretion to grant the State's challenge for cause against her.

Finally, this case is distinguishable from *Staley v. State,* 887 S.W.2d 885 (Tex.Cr.App.1994). There is an important difference between venireman Jones in this cause and venireman Chandler in *Staley,* whom we held to be subject to a State's challenge for cause. *Id.,* at 893-94. It is true that, as in *Staley,* the trial court in this cause gave an additional jury instruction at the punishment phase to accommodate the Eighth Amendment limitations on imposition to the death penalty announced in *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). We made it clear in *Staley* that the trial court did not violate the Sixth Amendment by granting a State's challenge for cause against a venireman who indicated he would always answer the Eighth Amendment special issue in such a way as to block imposition of the death penalty. Even in this context, however, mere opposition to the death penalty, even categorical opposition,

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[2] Moreover, that Jones' religious scruples "would affect her ability to be a fair and impartial juror," as the trial court concluded, even if supported by the record, would not necessarily render her exclusion acceptable under the Sixth Amendment. The trial court might simply have meant he believed "that the potentially lethal consequences of [Jones'] decision would invest [her] deliberations with greater seriousness and gravity or would involve [her] emotionally." *Adams v. Texas,* 448 U.S. 38, at 49, 100 S.Ct. 2521, at 2528, 65 L.Ed.2d 581, at 592 (1980). That would not be sufficient to insulate her exclusion from Sixth Amendment censure. *Id.,* U.S. at 50-51, S.Ct. at 2529, L.Ed.2d at 593.

does not alone suffice to justify granting the State's challenge for cause. The State must establish further that the venireman's opposition would cause him invariably to answer the Eighth Amendment issue in such a way as to insure that the sentence of death would not be imposed. See *Riley*, supra, at 301, n. 4.[3] The State did not even approach asking Jones whether her less-than-categorical opposition to the death penalty was substantial enough to cause her to answer the *Penry* special issue so as to foreclose the death penalty under any circumstances. Therefore, the State failed to satisfy its burden to show Jones was challengeable for cause on the basis we recognized in *Staley* either. The trial court erred to grant the State's challenge for cause against venireman Jones.

We have recently held that error in granting a State's challenge for cause against a venireman for inability to follow some facet of the law applying only at the punishment phase of trial constitutes "error affecting punishment only," and does not alone call for reversal of the conviction, but only a remand for a new punishment

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[3] Again, the most expedient method for the State to discharge its burden would be simply to ask the venireman point-blank whether his categorical opposition to the death penalty will cause him always to answer the *Penry* issue in such a way as to insure death will not be doled out, irrespective of the facts. The venireman who unswervingly maintains he will *not* invariably answer the *Penry* issue to prevent an execution may *not* be excused for cause, consistent with the Sixth Amendment. The venireman who maintains just as adamantly that he *will* must be excluded upon the State's challenge. And the venireman who genuinely equivocates or vacillates in his answer to this question is subject to challenge for cause, at the trial court's discretion. *See Brown v. State*, supra.

proceeding under Article 44.29(c), V.A.C.C.P. *Ransom v. State*, 920 S.W.2d 288 (Tex.Cr.App.1996) (Opinion on State's motion for rehearing). Therefore, while we need not reach appellant's other points of error alleging error at the punishment phase of trial, or error during voir dire that only affects punishment, we must address appellant's points of error alleging error at the guilt/innocence phase of trial, in order to determine whether the cause should be reversed and remanded for a whole new trial.[4] There are two such points of error, neither of which presents reversible error.

In his fifth point of error appellant contends that the jury charge on guilt/innocence was fundamentally defective in that the definition of "reasonable doubt" was not

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[4] In points of error one through four appellant complains that the trial court's jury instructions at the punishment phase of trial allowed the jury to assess the death penalty in violation of *Penry v. Lynaugh*, supra. Points of error seven through ten allege error in admitting certain evidence at the punishment phase of trial. Appellant contends in points of error eleven and twelve that Article 37.071 is invalid. In view of our remand for a new punishment hearing, we need not address these issues. In points of error thirteen and fourteen appellant claims the trial court erred to deny his challenges for cause against a pair of veniremen he contends harbored a bias in favor of the death penalty. And in points of error sixteen and seventeen he complains that trial court erred to deny challenges for cause against veniremen who would not consider certain evidence in mitigation of punishment. Like the error we reverse upon today, these alleged voir dire errors would only "affect" punishment in contemplation of our holding in *Ransom* on rehearing. Because we have sustained appellant's fifteenth point of error, and remand the cause for a new punishment hearing under Article 44.29(c), we need not reach these contentions either.

included in the application paragraph. While appellant concedes that a proper definition of "reasonable doubt" was submitted, as required by *Geesa v. State*, 820 S.W.2d 154 (Tex.Cr.App.1991), he contends that the trial court committed fundamental error not to apply that definition to the facts of the case.

It is true that a theory of law must be applied to the facts of a case, even though it may be defined in the abstract portion of the charge. *Jones v. State*, 815 S.W.2d 667, 668-69 (Tex.Cr.App.1991); *Garrett v. State*, 749 S.W.2d 784 (Tex.Cr.App.1986). However, the language of which appellant complains involves the definition of a concept. General instructions and definitional instructions need not be applied to the facts of a case. *Turpin v. State*, 606 S.W.2d 907, 910 (Tex.Cr.App.1980). The application paragraph plainly required that the State prove each element of the offense "beyond a reasonable doubt." This was sufficient to refer the jury to the definition of "reasonable doubt" appearing elsewhere in the jury charge,[5] and to require them to apply it in their deliberations at the guilt phase. This point of error is overruled.

In his sixth point of error appellant complains that the trial court erred in overruling a motion to suppress the clothing he was wearing at the time of his arrest. He

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[5] The *Geesa* definition appears after the application paragraph rather than before it. Although appellant alludes to this fact, he does not specifically complain of it. In any event, appellant did not object to this positioning at trial, and we are not inclined to believe that placing the definition after the application paragraph rather than before amounts to egregious error under *Almanza v. State*, 686 S.W.2d 157 (Tex.Cr.App.1985) (Opinion on rehearing).

contends the arrest was made *sans* warrant, and without justification for a warrantless arrest. As the fruit of this illegality, he contends, the clothing should have been suppressed pursuant to Article 38.23, V.A.C.C.P.

Appellant did not challenge the admissibility of the clothing until trial. Prior to trial, a hearing was held on his motion to suppress the product of an allegedly suggestive pre-trial identification procedure. At that hearing, and during the trial itself in the jury's presence prior to the trial court's ruling on the admissibility of the clothing, the following facts were elicited pertaining to appellant's arrest: On May 11, 1991,[6] Officer D.B. Goley was called and told to meet other officers at the 900 block of Jefferson Street in Fort Worth. Once at that location, Goley was informed that they were serving an arrest warrant on appellant who was presently at a friend's house located at 920 E. Allen Street. At approximately 11:00 a.m., Goley noticed an individual matching appellant's description leave the house and walk in his direction. As appellant approached Goley's position, Goley stepped out of his car, identified himself, and arrested appellant. Subsequently, Officer Larry Steffler arrived on the scene with the physical warrant in hand. Steffler testified that appellant's son, Alzie Davis, had called "911" at 6:45 a.m. the morning of May 11, 1991, to report that his father had confessed to him to having committed the robbery and murder in this cause. Steffler stated that he obtained the necessary information from Davis in order to draft the arrest warrant, then immediately proceeded to find a magistrate to sign the warrant. At the

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[6] The instant offense occurred on May 10, 1991.

suppression hearing, Steffler testified the warrant issued between 11:00 and 11:30 a.m. that same day. At trial he testified it issued between 10:30 and 11:00 a.m.

Appellant adduced no additional facts at the time he objected to the introduction of the clothing. He now suggests that the warrant had not issued at the time he was arrested, and that the arrest did not satisfy any of the justifications for warrantless arrest in Chapter 14 of the Code of Criminal Procedure. We disagree with appellant's premise. By his own testimony at the pre-trial suppression hearing, appellant established that he was arrested sometime between 11:30 and 12:00 noon. This indicates that the warrant had been issued by the time appellant was arrested. That the warrant was not physically present before the arrest was made does not matter under Article 15.26, V.A.C.C.P.[7] Thus it appears that appellant did not satisfy his "initial burden" to establish that a warrantless seizure even occurred. Russell v. State, 717 S.W.2d 7, 9 (Tex.Cr.App.1986). We cannot say the trial court abused its discretion to admit the clothing. Consequently we overrule appellant's sixth point of error.

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[7] Article 15.26 reads:

> "In executing a warrant of arrest, it shall always be made known to the accused under what authority the arrest is made. The warrant shall be executed by the arrest of the defendant. *The officer need not have the warrant in his possession at the time of the arrest, provided the warrant was issued under the provisions of this Code, but upon request he shall show the warrant to the defendant as soon as possible. . . .* "

Emphasis added.

Finding no error requiring a new trial in this cause, we vacate the judgment of the trial court and remand the cause to that court for a new punishment proceeding pursuant to Article 44.29(c), supra.

MANSFIELD, J., dissents.

MEYERS, J., not participating.